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In The

Supreme Court of the United States

October Term, 1956

No. 340

STATE OF OHIO, EX REL EDITH G. CHURCH, RALPH S. BROWN, ALOIS S. KNAPP,

Appellants,

v.

TED W. BROWN, AS SECRETARY OF STATE, STATE OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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OPINION BELOW

The Supreme Court of Ohio delivered a written opinion in the case and made certain conclusions of law in connection with the entry of the decree in question.

The opinion is reported in 165 Ohio St. 31. A copy of the court's opinion and order is set forth in the Appendix.

NATURE OF PROCEEDING AND STATUTE PURSUANT TO WHICH IT IS BROUGHT

The Appellants sought to form a non-profit corporation in the state of Ohio to be known as "National Nudist Council, Inc.," the purpose of which was to further the practice of Nudism in Ohio. To that end, articles of incorporation were drafted and submitted to the Secretary of State for filing and recording. The Secretary of State refused to comply with the request of Appellants relying on the following two sections of the Ohio Code to support his position: (1) Sec. 1702.05 of the Ohio Rev. Code, which says, a non-profit corporation may be formed for any purpose or purposes for which natural persons lawfully may associate themselves, and (2) Sec. 2905.31 of the Ohio Rev. Code, which forbids the practice of Nudism in Ohio.

Sec. 2731.02 of the Ohio Rev. Code says, "The writ of Mandamus may be allowed by the Supreme Court . . ." Pursuant thereto, Appellants did on October 29, 1955, invoke the original jurisdiction of the Supreme Court of Ohio by filing a petition in Mandamus, the prayer of which was that a writ be issued requiring the Secretary of State to accept for filing and recording the articles heretofore mentioned.

To this petition, Appellee filed a demurrer, which after submission of briefs and hearing of oral arguments, was sustained.

DATE OF JUDGMENT, ENTRY NOTICE OF APPEAL

The date of the final decree of the Supreme Court of the State of Ohio, which is now sought to be reviewed, was March 7, 1956, the entry having been made and certified by the Clerk of the Supreme Court of Ohio on March 14, 1956.

Under the provisions of 28 U.S.C. 2101(c), the Appellants had ninety days from March 14, 1956, in which to file their Notice of Appeal. Notice of Appeal was filed with the Clerk of the Supreme Court of Ohio by Appellants on May 18, 1956 and service on opposing counsel was effected on the same date in accordance with Rule 33(1), Revised Rules of the Supreme Court of the United States. Appellants then had 60 days, or until July 17, 1956, in which to docket their case, unless the time for docketing was enlarged under the procedure described in Rule 13(1). On June 29, 1956, at Appellants' request and for cause shown, the Chief Justice of the Supreme Court of Ohio did extend until August 31, 1956, the time in which Appellants could docket their cause in the Supreme Court of the United States.

JURISDICTION

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States is 28 U.S.C. 1257(2), reading to the extent relevant here, as follows:

> "Sec. 1257(2). Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows . . . By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws

of the United States, and the decision is in favor of its validity."

The following cases sustain the jurisdiction of the Supreme Court of the United States:

1. Jurisdiction to entertain an appeal from the decision of a state court on the ground that the state statute violates the "Equal Protection" clause of the 14th Amendment to the Constitution of the United States. Truax x Corrigan, 257 U.S. 312, 331, 42 S.Ct. 124, 66 L. Ed. 254. Norris v Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L. Ed. 1074.

2. Jurisdiction to entertain an appeal from the decision of a state court on the grounds that the state statute violates the First Amendment as coupled with the "due process" clause of the Fourteenth Amendment to the Constitution of the United States. DeJonge v Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L. Ed. 278. Near v Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L. Ed. 1357.

3. Jurisdiction to review on appeal the question of the validity of the state's use of its police power. Jacobson v Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L. Ed. 643. Liggett Company v Baldridge, 278 U.S. 105, 49 S.Ct. 57, 73 L. Ed. 204.

STATUTE INVOLVED

The statute of the state of Ohio, the validity of which has been sustained by a final decree of the Supreme Court of Ohio as not being violative of or repugnant to the Constitution of the United States, is Sec. 2905.31, Ohio Rev. Code, entitled "Nudism," the text of which is here set out verbatim:

> "No person eighteen years of age or over shall willfully expose his or her private parts in the presence of two or more persons of the opposite sex, or aid or

abet any such act, or procure another so to expose his or her private parts, or as owner, manager, lessee, director, promotor, or agent, or in any other capacity knowingly hire, lease or permit the land, building, or premises of which he is owner or lessor, lessee, or tenant, or over which he has control, to be used for any such purposes.

"Whoever violates this section shall be fined not more than two hundred dollars or imprisoned not more than six months, or both.

"This section does not apply to persons exposing themselves to persons administering bona fide nursing care, nor to such persons exposing themselves to persons licensed under the laws of this state to administer diagnostic, surgical, or therapeutic services or to others rendering any of such services in cases of emergency, nor to the members of a family among themselves, nor to persons bona fide posing for art purposes or exposing themselves for examination or observation in connection with scientific research and study, when such is the sole purpose of such exposure. "As used in this section, 'private parts' means the external genitalia of the human body."

QUESTIONS PRESENTED

Sec. 2905.31 of the Ohio Rev. Code, entitled "Nudism" makes the practice of Nudism a crime per se. That Nudists as a group maintain high and strict moral standards and that Nudist Camps are located in private, secluded spots is immaterial under the statute. Certain groups, in particular artists and models, are excluded from the operation of the statute. Nudism is a large movement in the United States. To its adherents, the practice of Social Nudism offers a real and genuine philosophy of life. To many it is a religion. The Ohio statute here in question pays heed to none of these factors. This situation

gives rise, therefore, to the following questions which are presented by this appeal:

(1) Whether the state statute here in question is violative of the various provisions of the First Amendment to the Constitution of the United States.

(2) Whether the state statute here in question operates in such a fashion as to deny to Appellants the "equal protection" envisioned by the Fourteenth Amendment to the Constitution of the United States.

(3) Whether enactment of Sec. 2905.31 of the Ohio Rev. Code was a valid exercise of the state's police power.

STATEMENT

Nudism is the practice, under proper circumstance, of going without clothes. The practice may be followed in the privacy of the home, among members of the same or opposite sex, or among groups including entire families and representing all ages.

As practiced by its true adherents, Nudism is free from vulgarity, lasciviousness or eroticism. It is rather a social practice aimed at improving mental and physical health by programs making the fullest possible use of sun, light and air.

Nudism has existed in the United States since the 1920's and has millions of adherents in this country, substantial numbers of which are in the state of Ohio. Of the states which comprise the Union, only Ohio and New York have statutes forbidding the practice of Nudism. During 1955, five state legislatures, viz., Arkansas, Kansas, Oklahoma, Michigan and Missouri refused to enact proferred anti-nudist legislation similar to the Ohio statute here in question.

The Appellants herein, all of whom have devoted years of effort toward the furtherance of the Nudist cause, felt they had a fundamental right to practice Nudism in Ohio and to attempt to convert the public to the Nudist cause. In furtherance of these aims and desires, Appellants attempted to form a non-profit corporation, the avowed and stated purpose of which was to promote Nudism in Ohio. To that end, articles of incorporation were drafted and submitted to the Secretary of State of Ohio, the Appellee herein, for filing and recording, which articles were accompanied by the required filing fee. In drafting and submitting the articles in question, Appellants effected strict compliance with all laws and rules governing the process of forming a non-profit corporation in Ohio.

On September 9, 1955, the Appellee acknowledged receipt of the articles of incorporation but refused to accept them for filing and recording. Appellee noted that the purpose of the proposed corporation was to promote and further the practice of Nudism in Ohio. Appellee then pointed out that Sec. 2905.31 of the Ohio Rev. Code made the practice of Nudism illegal in Ohio, and that Sec. 1702.05 of the Ohio Rev. Code provided that non-profit corporations could be formed for legal purposes only, and that, therefore, Appellee was compelled to refuse the request of Appellants.

Art. IV, Sec. 2 of the Ohio Constitution vests original jurisdiction of Mandamus proceedings in the Supreme Court of the State. It is further established in Ohio that the constitutionality of a statute may be raised in a Mandamus proceeding where the right to the issuance of the writ depends on a determination of this question, and the statute affirmatively imposes or excuses the performance of some duty. Kramer v State, ex rel Moore, 45 Ohio App. 389, 187 N. E. 256. Further, in Ohio, Mandamus is

considered an appropriate remedy to compel performance of a given act by the Secretary of State. State ex rel Gongwer v Graves, 90 O. S. 311, 107 N. E. 1018.

The Appellants did thereafter on October 28, 1955, invoke the original jurisdiction of the Supreme Court of Ohio, by filing a petition in Mandamus and on December 13, 1955, an amended petition. The prayer was that a writ of Mandamus issue compelling the Appellee to accept the above-mentioned articles of incorporation for filing and recording.

To Appellant's petition, Appellee filed a demurrer with supporting brief. The essence of Appellee's demurrer was as follows:

(1) Under the statutes of Ohio (Sec. 1702.05 Ohio Rev. Code) articles of incorporation for proposed non-profit corporations could be accepted for filing and recording only for purposes which are legal.

(2) That Sec. 2905.31 of the Ohio Rev. Code made the practice of Nudism a crime in Ohio.

(3) Since the submitted articles had as their purpose the promotion of Nudism in Ohio, that Appellee correctly refused to accept them for recording, and as a necessary corollary, that Appellants had no right to have the writ issued.

To Appellee's demurrer, Appellants filed a reply with supporting brief. The substance of Appellant's position was that the law on which Appellee relied to excuse performance, Sec. 2905.31 of Ohio Rev. Code, was unconstitutional and should be declared invalid by the court. In that connection, the following constitutional arguments were raised:

(1) That Appellants individually and as a group were

entitled to the basic freedoms guaranteed by the First Amendment to the Constitution of the United States, and that Sec. 2905.31 violated these rights.

(2) That Sec. 2905.31 of the Ohio Rev. Code by applying to Nudists, yet excluding other groups, denied Appellants "equal protection" envisioned by the Fourteenth Amendment to the Constitution of the United States.

(3) That the state's exercise of its police power was in this instance invalid. In addition to its being discriminatory, arbitrary and oppressive, particular emphasis was placed on the fact that the statute in question had no real and substantial relation to the purpose for which it was intended, viz., protection of morals.

To support and elaborate on the points raised in their respective briefs, the parties were permitted on oral argument before the Supreme Court of Ohio.

After deliberation, the Supreme Court of Ohio did on March 7, 1956, sustain Appellee's demurrer and denied the writ of Mandamus.

The Court's opinion is reported in 165 Ohio St. 31, and is set forth verbatim in the Appendix.

Pertinent portions of the opinion are quoted herewith:

"Relators contend that the section is unconstitutional being in direct violation of the First and Fourteenth Amendments to the Federal Constitution . . . that Relators have a basic right to assemble as Nudists with others of like belief; that their assemblage being peaceable in nature, the above quoted section is violative of the Federal and State Constitutions and operates in such a manner as to abridge the rights of freedom of

speech, freedom of press and peaceable assembly given by the Constitutions; and that the law is partial in its operation and unduly oppressive . . . The enactment of Sec. 2905.31, Rev. Code, was a valid exercise of the police power.

" 'In determining the constitutionality of the statute, as measured by the police power, we need only to inquire whether this statute is unreasonable, arbitrary and oppressive exercise of the police power, and whether it is really designed to accomplish a purpose falling within the scope of the police power. Every reasonable presumption is indulged in favor of its constitutionality, and if the statute bears any reasonable relation to the public welfare and public morals the court may not declare it to be invalid.' Davis v State, 118 Ohio St., 25, 160 N. E. 473."

THE QUESTION IS SUBSTANTIAL

A

The determination of Federal Constitutional questions was necessary in order to decide the case below.

It was pointed out in the court below that the Appellants herein had sufficient interest in the controversy at hand as to permit them to raise the constitutional question. A resume of the careers of each was included in the record, outlining the years of work and effort which each had contributed to the furtherance of Nudism.

The interest of the Appellants having been established, the Federal Constitutional issues were then presented. It was conceded by Appellants that if Sec. 2905.31 of the Ohio Rev. Code entitled "Nudism" was a valid law, then Appellants had no right to the issuance of the writ of Mandamus, since the statute in question did excuse the Appellee from performing the act requested by Appellants. Appellants contended, however, that the statute in ques-

tion violated the Federal Constitution, then raising the constitutional questions as listed herein. It was necessary for the Supreme Court of Ohio to determine the Federal Constitutional questions in order to have disposed of the case. Reference is made in the court's opinion to the fact that the Federal Constitutional questions were raised and the court did conclude that the state's exercise of its police power in this instance was a valid one.

B

The Federal Constitutional Questions herein presented are substantial.

1. The Appellants respectfully represent that the questions involved in their appeal to the Supreme Court of the United States are of a substantial nature. It is well established that an appeal will not be dismissed for want of a substantial Federal Question, unless the contentions of Appellant are "clearly not debatable and utterly lacking in merit." Hamilton v Regents of University of California, 293 U.S. 245, 258, 55 S.Ct. 197. Chesbro v Los Angeles Flood Control District, 306 U.S. 459, 59 S.Ct. 622.

2. The fact that a question has never been expressly passed on by the Supreme Court of the United States adds to its substantiality. Senn v Tile Layers Protective Union, 301 U.S. 468, 476, 57 S.Ct. 857. It is submitted that the question herein presented, viz., whether the right to practice Nudism is one of the personal liberties protected by the various provisions of the Federal Constitution herein cited, has never been before the Supreme Court of the United States.

3. The Federal questions herein presented are ones which the parties may and do assert on their own behalf and not merely on behalf of others. In the record below,

it was pointed out that each of the Appellants had devoted years of work and effort to furthering the cause of Nudism. Each is a sincere Nudist. The denial to any of the Appellants of the right to practice Nudism vitally affects one of his most fundamental beliefs and correspondingly becomes a very important matter to him. While the Appellants do assert the question on their own behalf, the determination of the issues herein will also be of great importance to numerous persons in Ohio who believe in the practice of Nudism.

4. The most vital point of all the facts here involved is that the Appellants are advocating the cause of Nudism. Advocacy is protected by the First Amendment and any aspect of that advocacy fairly and reasonably devoted to the cause urged is likewise protected. Reilly v Pinkus, 338 U.S. 269, 274, 70 S.Ct. 110. There can be no genuine advocacy of the cause of Nudism without the right to practice it. Advocacy through speaking and writing is limited. In order to sell the public on the merits of Nudism, it is necessary to operate Nudist camps and to provide opportunity for the prospects to actually practice Nudism. Only under such conditions could Appellants and others of like view have a fair chance to convert non-believers. Nudism is a way of life about which there is some difference of opinion. In America, it is a new idea which is struggling for its place in the market of human thought. The exploration of new ideas has added immeasurably to the dynamics of American democracy. The Ohio legislation here in question acts as a barrier to the exploration of an idea. It becomes of the utmost importance, therefore, to determine what constitutional rights are curtailed through its operation.

5. In State v Lerner, 51 O. L. Abs. 321, 81 N. E. 2d 282, the Common Pleas Court of Hamilton County, Ohio

was called on to determine whether "Sunshine and Health," a Nudist magazine, was obscene. At the time of the decision, June 9, 1948, the magazine in question was the official publication of the American Sunbathing Association, Inc., and subsequently it became the publication of the National Nudist Council, which is among the largest and most influential of the Nudist groups in this country. Point No. 11 in the syllabus of the case as carried on p. 322 of 51 O. L. Abs. reads as follows:

> "Photographs of nude persons throughout a magazine of general circulation published for the purpose of advocating Nudism as a philosophy of life do not constitute obscenity."

Sec. 2905.31 of the Ohio Rev. Code, entitled "Nudism" reads to the extent here relevant:

> "No person eighteen years of age or over shall willfully expose his or her private parts in the presence of two or more persons of the opposite sex or aid or abet any such act or procure another so to expose his or her private parts."

Sec. 1.17 of the Ohio Rev. Code provides that any person who aids, abets, or procures another to commit an offense may be prosecuted and punished as if he were the principal offender. Blacks Law Dictionary, 4th ed. on page 91, defines "aid and abet" as follows:

> "Help, assist or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about, or encourage, counsel or encite as to its commission."

In State v Butler, 11 Ohio Supp. 18, 25 O. O. 567, 38 O. L. A. 211, it was held that any person who aided, advised or procured commission of a misdemeanor, though absent at the time of its commission, could be held as principals.

The law directly above quoted establishes the right to

advocate Nudism through magazine publications in the State of Ohio. On the other hand, the various sections of the Ohio Rev. Code and other matter just above quoted make the practice of Nudism a crime and correspondingly carries punishment for anyone who aids and abets the practice of Nudism or procures others to practice it. Whether Appellants and others of like belief could advocate Nudism through publication is not clear. It is a matter of importance, therefore, that this matter be clarified.

6. The use of its police power in this instance by the State of Ohio borders on thought control. The legislation here in question offers as its justification the protection of public morals. The practice of Nudism is made a crime per se, being thus labelled as an immoral movement against which the public of Ohio must be protected. In the Ohio Rev. Code, Nudism is included in Chapter 2905, which is entitled "Offenses Against Chastity." It is cataloged alongside such repulsive offenses as carnal knowledge, incest, adultery, fornication, pandering and prostitution. The idea presented by the statute is clearly open to challenge. There is an abundance of support from the most respectable lay and legal sources to prove that Nudism is a highly moral movement and that the manner in which it is practiced does not offend the public. The arbitrary classification and labelling which results from this statute gives the public a completely false picture of Nudism. It becomes important to Appellants and other adherents, therefore, to be given opportunity to combat the erroneous impression created by the statute here in dispute.

7. Appellants contend that the basic and fundamental rights guaranteed by the First Amendment to the Constitution of the United States are abrogated by this statute. Clearly, assembling together to practice Nudism is forbidden even though the assemblage be peaceable, secluded

and respectable. Freedom of speech is restricted since true Nudists cannot fully express themselves except in the actual practice of Nudism. With the criminal label showing for all to see, the opportunities to advocate, sell and convert becomes extremely limited either through oral or written mediums. These basic freedoms—assemblage, speech and press— furnish the bulwark of constitutional liberty. The right of the state to abridge these liberties is the exception rather than the rule. Herndon v Lowry, 301 U.S. 242, 57 S.Ct. 732. The broadest possible interpretation is given in determining the scope of these freedoms. Thornhill v Alabama, 310 U.S. 88, 60 S.Ct. 736. The mere fact that these issues are involved adds considerably to the substantiality of the questions presented.

8. Nudism is a way of life which its followers find to be entirely beneficial and salutary. As such, it is in effect just as consonant with religion as any denomination which has a name that identifies those who believe as members of that specific group. In that connection, the Appellants herein do consider Nudism a religion.

9. Appellants herein are made the victims of a discriminatory classification by the operation of the statute. While Nudists are forbidden to practice Nudism, persons who are "bona fide posing for art purposes" are excluded from the operation of the statute. It is submitted that nudity is more important to Nudists than to artists and their bona fide posers. It is further submitted that moral standards among Nudists are at least as high and probably higher than those of artists and posers. Assigning Nudists such a relatively low position on the moral scale is an arbitrary and unjust discrimination which denies to Appellants the "equal protection" envisioned by Sec. 1 of the Fourteenth Amendment to the Constitution of the United States.

10. Practicing Social Nudism requires a group effort. An organization is needed for the pooling of resources with which to establish camps with the proper locations and with adequate facilities. With the passage of time, the corporation has become more and more the popular vehicle for the carrying on of various types of activity involving a number of persons. The principal advantage of incorporating lies in the fact that a member is not liable as such for the obligation of the organization. Members are correspondingly protected against extensive liability. Denying Nudists the right to form a corporation is denying this group the protection afforded to others who are allowed to incorporate.

11. It is conceded that certain segments of the public prefer neither to be seen nor to see others unclad. Out of respect to this view, Nudists exercise great care in conducting their gatherings. Such meetings are held in private, secluded spots well away from the public. But if for any reason, there should be any public display of Nudity, the state of Ohio has a statute to cover the situation. Sec. 2905.30 of the Ohio Revised Code reads to the extent here relevant as follows:

> "No person eighteen years of age or over shall willfully make an indecent exposure of his person in a public place where there are other persons to be offended or annoyed thereby . . ."

This statute is actually a restatement of the Common Law rule on Nudism. At common law, exposure of private parts was an offense, but in order to be punishable the act must have occurred in public or where members of the public might have observed it. Comm v Hamilton, 36 S. W. 2d 342. Appellants and other Nudists have no quarrel with this type of legislation. It is submitted that the statute just above quoted affords sufficient protection against

any form of Nudity which might be offensive to the public. It is further submitted that the statute against Nudism is not needed to protect the public but rather needlessly deprives Nudists of constitutional rights.

CONCLUSION

As it has to the Appellants, Nudism has become an important part of the life of millions of Americans and their families, and has definitely established for itself a place on the American scene. The number is growing rapidly. Its position within the framework of American Constitutional Democracy should be determined. The questions presented by this appeal are substantial and are of public importance. Appellants should be permitted to present the merits of their case in more detail through briefs and oral arguments. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

State ex rel Church et al v. Brown, 165 Ohio St. 31

HART. J.

The State, ex rel. Church et al., v. Brown, Secy. of State.

(No. 34624—Decided March 7, 1956.)

IN MANDAMUS.
ON DEMURRER to Petition.

The relators have invoked the original jurisdiction of this court for the purpose of obtaining a writ of mandamus to require the respondent Secretary of State to accept for filing and recording articles of incorporation of a proposed nonprofit corporation to be known as "National Nudist Council, Inc."

Relators allege in their amended petition that they "all are adults of legal age and under no disability"; that they have devoted many years of work to the furtherance of the nudist movement in this country, motivated by a desire to serve this cause; that to relators and other sincere adherents nudism is a religion; that all nudist groups maintain strict and high moral standards and seek constantly to improve physical and mental health; that it is relators' desire and they believe their inherent right to practice nudism within the state of Ohio, to conduct a program of general education and information in explanation of the movement, to attempt to convert the public to their point of view and to form nudist clubs; and that relators believe a nonprofit corporation to be the most effective organization for their purposes.

Relators allege further that they have tendered to respondent articles of incorporation for the proposed non-

profit corporation, with the necessary filing fee and with the request that they be accepted for filing and recording, and that respondent refuses to comply with the request.

The prayer is for a writ requiring respondent to accept for filing and recording the articles of incorporation, and that he be required to perform all acts which it is his duty to do in connection with the incorporation of such proposed corporation.

To this petition respondent has filed a demurrer on the ground that the amended petition does not state facts sufficient to constitute a cause of action.

Messrs. Day and Combest, for relators.

Mr. C. William O'Neill, attorney general, *Mr. Ralph Klapp* and *Mrs. Neva H. Wertz,* for respondent.

Per Curiam. Respondent's refusal to accept the articles of incorporation for filing and recording is on the ground that relators are seeking to form a nonprofit corporation to carry on activities which are, at least in part, prohibited by Section 2905.31, Revised Code, namely, the practice of the cult of nudism.

That section provides in part: "No person 18 years of age or over shall willfully expose his or her private parts in the presence of two or more persons of the opposite sex, or aid or abet any such act, or procure another so to expose his or her private part * * *." The section provides further that it shall not be applicable to persons exposing themselves for nursing or medical care or bona fide posing for art purposes.

Relators contend that the section is unconstitutional, being in direct violation of the First and Fourteenth Amendments to the Federal Constitution, and Sections 1, 2, 3 and 11 of Article I of the Ohio Constitution; that re-

lators have a basic right to assemble as nudists with others of a like belief; that, their assemblage being peaceable in nature, the above-quoted section is violative of the federal and state Constitutions and operates in such a manner as to abridge the rights of freedom of speech, freedom of the press, and peaceable assembly given by the Constitutions; and that the law is partial in its operation and unduly oppressive.

The articles of incorporation set forth as the purposes of the proposed corporation:

"A. To further the practice of nudism.

"B. To promote and develop a strong nudist movement composed of member clubs and individual members.

"C. To provide private facilities where members of both sexes may congregate together and in the presence of each other practice nudism without intrusion from or interference by the public.

"D. To develop a program to enlighten the public on the benefits of social nudism.

"E. To foster public health through the teaching and practice of physical and mental hygiene."

The merits of nudism as a doctrine of life need not be considered in deciding this case. The question presented is whether relators may form a nonprofit corporation to carry on activities which are, at least in part, prohibited by statute.

Section 1702.03, Revised Code, appearing in the chapter, "Nonprofit Corporation Law," provides in part: "A corporation may be formed for any purpose or purposes for which natural persons *lawfully* may associate themselves * * *." (Emphasis added.) Clearly, a nonprofit corporation can not be formed for an unlawful purpose.

The formation of a corporation "to provide private facilities where members of both sexes may congregate together and in the presence of each other practice nudism," as stated in the proposed articles of incorporation, clearly would be violative of Section 2905.31, Revised Code, which prohibits the practice of nudism, regardless of the belief of those desiring to practice it as a doctrine of life, cult or sect.

The enactment of Section 2905.31, Revised Code, was a valid exercise of the police power.

"In determining the constitutionality of the statute, as measured by the police power, we need only to inquire whether this statute is an unreasonable, arbitrary, and oppressive exercise of the police power, and whether it is really designed to accomplish a purpose falling within the scope of the police power. Every reasonable presumption is indulged in favor of its constitutionality, and if the statute bears any reasonable relation to the public welfare and public morals the courts may not declare it to be invalid." *Davis* v. *State*, 118 Ohio St., 25, 160 N.E., 473.

The relators not having shown by their petition a clear legal right to the relief prayed for, the demurrer to the petition is sustained and, relators not desiring to plead further, a writ of mandamus is denied.

Demurrer sustained and writ denied.

WEYGANDT, C.J., MATTHIAS, HART, ZIMMERMAN, STEWART, BELL and TAFT, J.J., concur.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 340.

THE STATE OF OHIO, EX REL. EDITH G. CHURCH, RALPH S. BROWN AND ALOIS S. KNAPP,

Appellants,

vs.

TED W. BROWN, AS SECRETARY OF STATE, STATE OF OHIO,

Appellee.

MOTION TO DISMISS.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal from the final judgment and decree of the Supreme Court of Ohio be dismissed on the ground that the judgment rests on an adequate non-federal basis.

I.

STATUTES INVOLVED.

In the jurisdictional statement filed in the Supreme Court of the United States, the appellants have, on pages 6 and 7, quoted in full Section 2905.31, Revised Code of Ohio, which they believe and claim is, as applied to them, violative of or repugnant to the First and Fourteenth Amendments to the Constitution of the United States.

In addition to Section 2905.31, Revised Code of Ohio, the pertinent language of the corporation law of Ohio is essential to any consideration of this appeal.

Section 1702.05, Revised Code of Ohio, was in effect on September 9, 1955, when the appellants submitted to the appellee, the secretary of state of the state of Ohio, the Articles of Incorporation of the proposed National Nudist Council, Incorporated. Section 1702.05, Revised Code of Ohio, then provided:

> "A corporation not for profit may be formed under sections 1702.05 to 1702.23, inclusive, of the Revised Code, for any purposes, not involving pecuniary gain or profit, for which natural persons may lawfully associate themselves, except that where the Revised Code make special provision for the filing of articles of incorporation of designated classes of corporations not for profit, such corporations shall be formed under such provision and not under sections 1702.05 to 1702.23, inclusive of the Revised Code."

The above-quoted section was repealed by Amended House Bill No. 70, 126 Ohio Laws, and present Section 1702.03, Revised Code, which became effective October 11, 1955, was enacted. The said Section 1702.03, Revised Code of Ohio, reads:

> "A corporation may be formed for any purpose or purposes for which natural persons lawfully may as-

sociate themselves, provided that when there is a special provision in the Revised Code for the formation thereunder of a designated class of corporations, a corporation of such class shall be formed thereunder."

As shown by Section 1702.01, Revised Code of Ohio, the words "corporation" as used in Section 1702.03, Revised Code of Ohio, means a non-profit corporation.

II.

STATEMENT.

The final judgment and decree of the Supreme Court of Ohio, from which this appeal is taken, denied these appellants a writ of mandamus requiring the secretary of state of the state of Ohio to accept for filing and recording certain articles of incorporation for a proposed corporation not for profit which was to be known as National Nudist Council, Incorporated. The purposes of this proposed non-profit corporation, as shown by Item III of the articles subscribed, acknowledged and presented by these appellants to the secretary of state, on September 9, 1955, were:

"A. To further the practice of nudism.

B. To promote and develop a strong nudist movement composed of member clubs and individual members.

C. To provide private facilities where members of both sexes may congregate together and in the presence of each other practice nudism without intrusion from or interference by the public.

D. To develop a program to enlighten the public on the benefits of social nudism.

E. To foster public health through the teaching and practices of physical and mental hygiene."

These articles of incorporation were refused by the secretary of state for the reason the corporations not for profit could then and may now be formed in Ohio only for those purposes for which natural persons lawfully may associate themselves. The purposes of this proposed non-profit corporation were and are, at least in part, directly prohibited by Section 2905.31, Revised Code of Ohio.

Following the refusal of the secretary of state to accept for filing and recording the said articles of incorporation, these appellants, as relators filed in the Supreme Court of Ohio a petition and an amended petition for a writ of mandamus requiring the said secretary of state to accept the articles presented and thus grant to the proposed corporation a corporate charter. The Supreme Court of Ohio sustained a demurrer to the petition and denied the writ of mandamus.

(The opinion of the Supreme Court of Ohio, which is reported in 165 Ohio St., 31, is set forth in full as the appendix of the jurisdictional statement filed on behalf of the appellants.)

III.

ARGUMENT.

A. The Judgment of the Supreme Court of Ohio Rests on an Adequate Non-federal Basis.

The specific relief requested in the Ohio Supreme Court, and there denied, was authority to form a corporation not for profit; any rights claimed by these appellants to practice and advocate nudism without the privileges and protection of the corporate form or organization were not there and are not here involved.

These appellants asserted in the petition filed in the Supreme Court of Ohio that they believe they have an inherent right both to practice nudism and to carry on a program designed to further the aims of the nudist movement within the state of Ohio. They then asserted that a non-profit corporation would be the most effective method of carrying out their purposes. There is, however, no inherent right to become a state corporation for any purpose.

The right to become a corporate entity is not an inherent or natural right.

Ashley v. Ryan, 153 U. S., 436, 441; 38 L. ed., 773, 777.

Prudential Insurance Company v. Cheek, 259 U. S., 530, 536; 66 L. ed., 1044, 1051.

The granting of the rights and privileges of the corporate form of organization rests entirely within the discretion of the state.

Home Insurance Company v. New York, 134 U. S., 594, 600; 33 L. ed., 1025, 1029.

State of Maine v. Grand Trunk Railway Company, 142 U. S., 217, 228; 35 L. ed., 994, 995.

Horn Silver Mining Company v. New York, 143 U. S., 305, 313; 36 L. ed., 164, 168.
Ashley v. Ryan, 153 U. S., 436, 442; 38 L. ed., 773, 777.

Those who seek and obtain a charter of incorporation must take the benefit under the conditions and with the burdens prescribed by the laws then in force.

Rochester Railway Company v. City of Rochester, 205 U. S., 236, 255; 51 L. ed., 784, 792.
Yazoo & Mississippi Valley Railway Company v. City of Vicksburg, 209 U. S., 358, 365; 52 L. ed., 833, 835.

The privilege of becoming a corporation may be accompanied with such conditions as the legislature may deem most suitable to its interests and policy.

Maine v. Grand Trunk Railway Company, 142 U. S., 217, 228; 35 L. ed., 994, 995.
Home Insurance Company v. New York, 134 U. S., 594, 600; 33 L. ed., 1025, 1029.
The Horn Silver Mining Company v. State of New York, 143 U. S., 305, 313; 36 L. ed., 164, 168.
Ashley v. Ryan, 153 U. S., 436, 441; 38 L. ed., 773, 776.
Prudential Insurance Company v. Cheek, 259 U. S., 530, 536; 66 L. ed., 1044, 1051.

Conditions under which corporations shall organize and operate are matters within the exclusive province of the state, so long as those conditions do not clash with the national constitution.

Voeller v. Neilston Warehouse Company, 311 U. S., 531, 535; 85 L. Ed., 322, 325.

In creating a corporation a state may withhold powers which may be exercised by and cannot be denied to an individual. It is under no obligation to treat both alike.

Berea College v. Kentucky, 211 U. S., 45, 54; 53 L. ed., 81, 85.

Such a statute may conflict with the federal Constitution in denying to individuals powers which they may rightfully exercise, and yet at the same time be valid as to a corporation created by the state.

Berea College v. Kentucky, 211 U. S., 45, 54; 53 L. ed., 81, 85.

B. The Judgment of the Supreme Court of Ohio Did Not Necessarily Determine a Federal Question and, Therefore, Should Not Be Reviewed By This Court.

In the *per curiam* opinion of the Supreme Court of Ohio it is said that Section 2905.31, Revised Code of Ohio, is a valid exercise of the police power. This, however, was not the basis of the judgment. The question presented, as is also said in the opinion, is whether or not the relators may form a non-profit corporation for purposes which are, at least in part, prohibited by statute. See the appendix, jurisdictional statement, page 22.

This court has consistently followed the principle that judgments of state courts will not be reviewed where they rest upon adequate and independent state grounds.

Murdock v. Memphis, 20 Wall., 590, 636; 22 L. ed., 429, 444.

Berea College v. Kentucky, 211 U. S., 45, 53; 53 L. ed., 81, 85.

Fox Film Corporation v. Muller, 296 U. S., 207, 210; 80 L. ed., 158, 159.

Herb v. Pitcairn, 324 U. S., 117, 125; 89 L. ed., 789, 794.

Radio Station WOW, Inc., v. Johnson, 326 U. S., 120, 129; 89 L. ed., 2092, 2100.

Young v. Ragen, 337 U. S., 235, 238; 93 L. ed., 1333, 1336.

IV.

CONCLUSION.

The state of Ohio has seen fit to restrict the purposes for which a corporation not for profit may be organized to those that could be lawfully entered into by an association of natural persons. These appellants do not attack this requirement; indeed they could not. They, rather, take the somewhat unique position that a criminal law of Ohio enacted under the police power of the state must be swept aside so that the proposed purposes will no longer be unlawful; they are seeking a grant of authority from the sovereign to do that which the sovereign has forbidden.

We respectfully submit, therefore, that the judgment and decree of the Supreme Court of Ohio rests upon an adequate non-federal basis and that this appeal should be dismissed.

Respectfully submitted,

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SEP 28 195
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In The

Supreme Court of the United States

October Term, 1956

NO. 340

STATE OF OHIO, EX REL. EDITH G. CHURCH,
RALPH S. BROWN, ALOIS S. KNAPP,

Appellants,

v.

TED W. BROWN, AS SECRETARY OF STATE,
STATE OF OHIO,

Appellee.

BRIEF OPPOSING MOTION TO DISMISS

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In The

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NO. 340

STATE OF OHIO, EX REL EDITH G. CHURCH, RALPH S. BROWN, ALOIS S. KNAPP,

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Appellee.

BRIEF OPPOSING MOTION TO DISMISS

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Pursuant to Rule 16 (3), Revised Rules of the Supreme Court of the United States, Appellants do file this brief in opposition to Appellee's Motion to Dismiss.

ARGUMENT

Rule 16 (1) (b) of this court reads as follows:

> "The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; or that the Judgment rests on an adequate non-federal basis."

On pp. 5 and 7 of his motion to dismiss, Appellee lists two arguments in support of his contention, which are as follows:

> "A. The Judgment of the Supreme Court of Ohio rests on an adequate non-federal basis."
>
> B. The Judgment of the Supreme Court of Ohio did not necessarily determine a federal question and, therefore, should not be reviewed by this court."

It is interesting to note that Appellee did not question the contention contained in pp. 13 through 19 of Appellant's Jurisdictional Statement that substantial and important federal questions were involved in this appeal, therefore leaving unchallenged the most important reason for assumption of jurisdiction by the Supreme Court of the United States. Nor does the motion contain any charge that the federal question was not timely or properly raised.

In examination of the arguments put forward by Appellee, we consider first Argument B on p. 7 of the motion, which states that the judgment below "did not necessarily determine a federal question." Rule 16 (1) (b)

above quoted, does not list among the grounds for receiving a motion to dismiss the fact that the court below "did not necessarily determine a federal question." It is presumed that Appellee means that the federal question was not "expressly passed on." A determination of this problem first calls for an inquiry as to whether the federal constitutional issues were drawn in question. In Dickinson v. Stiles, 246 U. S. 631, 38 S. Ct. 415, 62 L. Ed. 908, is the following language:

> "Where the federal claim was called to the attention of the trial court and discussed by the state appellate tribunal, it was sufficiently raised and drawn in question."

In the Appendix to Appellant's Jurisdictional Statement on pp. 21 & 22 appears the following paragraph taken from the opinion delivered by the Supreme Court of Ohio:

> "Relators contend that the section is unconstitutional being in direct violation of the First and Fourteenth Amendments to the Federal Constitution and Sections 1, 2, 3 and 11 of Article I of the Ohio Constitution; that relators have a basic right to assemble as nudists with others of like belief; that, their assemblage being peaceable in nature, the above-quoted section is violative of the federal and state constitutions and operates in such a manner as to abridge the rights of freedom of speech, freedom of the press, and peaceable assembly given by the Constitutions; and that the law is partial in its operation and unduly oppressive."

Employing the test of the Dickinson case supra, it is submitted that the federal constitutional issues were drawn in question, which leads to the next inquiry as to whether the issues were then "expressly passed on." Continuing to quote from the opinion rendered by the court below, on p. 23 of the Jurisdictional Statement, we fined as follows:

> "The enactment of Section 2905.31, Revised Code, was a valid exercise of the police power.

> " 'In determining the constitutionality of the statute, as measured by the police power, we need only to inquire whether this statute is an unreasonable, arbitrary, and oppressive exercise of the police power, and whether it is really designed to accomplish a purpose falling within the scope of the police power. Every reasonable presumption is indulged in favor of its constitutionality, and if the statute bears any reasonable relation to the public welfare and public morals the courts may not declare it to be invalid.' Davis v. State, 118 Ohio St., 25, 160 N. E. 473."

The fact that the court specifically enumerated and acknowledged the federal constitutional questions raised by Appellants and proceeded to state that the statute in question was a valid exercise of the police power, with reasons therefor, would seem to make untenable the position that the federal constitutional questions were not "expressly passed on."

Appellee makes reference to that part of the courts opinion found on p. 22 of the Jurisdictional Statement, and which reads as follows:

> "The merits of Nudism as a doctrine of life need not be considered in deciding this case. The question presented is whether Relators may form a non-profit corporation to carry on activities, which are, at least in part, prohibited by statute."

The paragraph just above quoted is in no way decisive of the issue of whether federal questions raised below were "expressly passed on." Such a determination is itself a federal question to be decided by the Supreme Court of the United States from the record before it. Schuykill Trust Co. v. Pennsylvania, 296 U. S. 113, 56 S. Ct. 31, 80 L. Ed. 91. The Supreme Court is not bound by the reasons assigned by the state court nor grounds upon which the decision is based, nor is it limited to consideration of the

language of the state decision. Irving Trust Co. v. Day, 314 U. S. 556, 62 S. Ct. 398, 86 L. Ed. 452.

In N. Y. ex rel Bryant v. Zimmerman, 278 U. S. 63, 49 S. Ct. 61, 73 L. Ed. 184, it was held regarding the question here under discussion that if the necessary effect of a state court judgment was to deny a federal claim, that the terms in which the ruling was put are immaterial. In Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 42 S. Ct. 101, 66 L. Ed. 227, is found authority for the proposition that if a state statute is upheld and enforced as against a federal claim, that the matter is reviewable by this court, regardless of the grounds on which the decision of the lower court rested.

Applying the rules above stated to the case at hand, it is undeniable from the record before us that the Appellants herein did assert federal rights. The Court below did note in the record that these rights had been asserted. The end result of the decision in this case was to deny the federal claims put forward by the Appellants. On being examined in its entirety, the record clearly shows that the federal constitutional issues were "expressly passed on" by the court below.

We now consider the other phase of Appellee's motion that the judgment of the Supreme Court of Ohio rested on an adequate non-federal basis.

Appellants contend first that the decision below was not based on a non-federal ground. Appellee's contrary view is based on the fact that Appellants, in the prayer of their petition, asked that the Secretary of State be compelled to accept the proffered articles of incorporation for filing and recording. Appellee then reasons that the specific relief requested is authority to incorporate and that the granting of corporate rights and privileges is at the

discretion of the state. Hence, Appellee feels that the case could be, and was, disposed of on state grounds alone.

The first observation in order is that the real issue in any type of litigation is seldom, if ever, found in the prayer of the petition or within the confines of the specific order requested. In a negligence case arising out of an automobile accident, for example, the prayer always asks for a certain amount of money for damages. The final order awarding an amount of money, however, is only a formality which must be preceded by a determination of fault, which is the real issue. Take next the case of a student who, though otherwise qualified, is refused admission to a university because of his race or color. When this student seeks to have the federal court compel the university to admit him, his prayer and specific order requested will be to compel the university to enroll him as a student. Whether the university will be ordered to enroll him is in no way the issue of the case, however, as a determination of the constitutional rights involved would of necessity precede and determine any order.

Turning to the case at hand, whether the Secretary of State of Ohio, the Appellee herein, should be compelled to accept for recording the proffered articles of incorporation is certainly not the issue. Whether the Appellee is or is not ordered to issue the articles would depend on the determination of the primary issue, viz., the constitutionality of Sec. 2905.31 of the Ohio Rev. Code. The Secretary of State of Ohio is a ministerial officer. He has no discretion over whether to grant or withhold issuance of a corporate charter, although it is true that he can refuse to accept articles for recording if there are discrepancies in form. As is stated in 12 Ohio Jur. 2d 77:

> "The duty of the Secretary of State with respect to the filing and recording of articles of incorporation is

said by the Supreme Court to be controlled by the statutes of the state. The discretion to be exercised by the Secretary of State does not reach the merits of the application for the articles of incorporation, although it may be exercised as to matters of form."

It is difficult, therefore, to follow Appellee's reasoning that an order to this official directing him to record articles of incorporation should be so elevated or should in any manner be granted the status of being a real issue in this case. Appellants contend, therefore, that the court below based its decision on the issue of the constitutionality of Sec. 2905.31 and deciding that the law was valid and was not unconstitutional, declined to order any performance by the Secretary of State.

Assuming, however, that it was the intention of the court below to rest its decision on a non-federal ground, we still have the question of whether or not the non-federal ground afforded an adequate basis for the decision. Some general considerations are first in order.

In Williams v. Kaiser, 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398, it is stated that it will be presumed that the state court based its decision on federal grounds if independent state grounds were not a substantial or sufficient basis for the decision. In Adams Express Company v. Iowa, 196 U. S. 147, 25 S. Ct. 185, 49 L. Ed. 424, it was held that the state court cannot, by resting its decision on local law, defeat the appellant jurisdiction of the Supreme Court, where the federal claim, if recognized and enforced, would require a different judgment. The real issue here involved, then, may be stated as follows: Even if we assume that the court below intended to base its decision on a non-federal ground, was the non-federal ground adequate to support the judgment or decree in view of the Federal Constitutional rights which Appellants did assert? With these guiding princi-

ples and issues in mind, let us examine the facts of this case.

Appellants requested that Appellee accept certain articles of incorporation for filing and recording, the stated purpose of the proposed corporation being to further the practice of social nudism in the state of Ohio. Appellee's answer was that the stated purpose was illegal in Ohio, and consequently that he could only refuse the request of Appellants. Appellants then filed a petition in mandamus seeking to compel the Appellee to perform the requested act. Ohio law holds that mandamus is an appropriate remedy for compelling the Secretary of State to either perform a given act or show cause for refusal. State ex rel Gongwer v. Graves, 90 O. S. 311, 107 N. E. 1018. Appellee's answer was that Sec. 2905.31 of the Ohio Rev. Code made the practice of Nudism, the purpose of the proposed corporation, illegal, thereby, excusing Appellee from any duty to accept the articles for recording. This was the one and only reason ever put forward as a basis for denying the request of Appellants. Appellants then raised the issue that the statute in question, Sec. 2905.31 of the Ohio Rev. Code, (set out in full on pp. 6 and 7 of the Jurisdictional Statement) was repugnant to various provisions of the constitution of the United States. Kramer v. State, ex rel Moore, 45 Ohio App. 389, 187 N. E. 256, holds that the constitutionality of a statute may be raised in a mandamus proceeding where the right to the issuance of the writ depends on a determination of the question, and the statute affirmatively imposes or excuses the performance of some duty.

The court, therefore, had before it a Federal Constitutional issue, to wit, whether Sec. 2905.31 of the Ohio Rev. Code was repugnant to various provisions of the Constitution of the United States. This issue was placed before the

Supreme Court of the State of Ohio pursuant to and in accordance with Ohio procedural law and no objection is in the record opposing the timeliness or the manner in which this issue was brought before the court. The supposed non-federal ground on which the court could at this point dispose of the case involved the state's authority on granting or withholding corporation privileges. The ultimate decision was that Appellants request to have Appellee perform the act was denied. Could this decision have rested on the non-federal ground alone? There is ample support for a negative answer.

If the federal issue had been decided in favor of Appellants, and Sec. 2905.31 of the Ohio Rev. Code declared unconstitutional, then Appellee could no longer have said to Appellants that the purpose of the proposed corporation was illegal. The only reason which Appellee had forwarded as the basis for refusing Appellants request would have disappeared. The Secretary of State, the Appellee herein, could no longer have showed cause why he should not accept the articles. It should be noted that the discretion in corporate matters belongs to the state but not to the Secretary of State. In State ex rel Steubenville Gas Company v. Taylor, 55 O. S. 61, 44 N. E. 513, it is stated that if articles are tendered to the Secretary of State for filing and are in proper form and show compliance with the law, it is the duty of the Secretary of State to file and record the same, and in case of his wrongful refusal, mandamus will lie. See also Pratt-Low Preserving Company v. Jordan, 217 Cal. 292 18 P(2d) 676. On the other hand, in deciding against Appellants on the constitutional issue by upholding the validity of Sec. 2905.31 of the Ohio Rev. Code, the court below had a logical basis for its ultimate decision. The reason affording the Appellee an excuse for not performing the requested act of Appellants still stood, and consequently, no writ would be issued to compel Ap-

pellee to perform.

Appellants, therefore, conclude that even if it had been the intention of the court below to rest its decision on a non-federal basis, that such grounds would not furnish an adequate basis for the decision.

CONCLUSION

Appellants conclude that the distinguished court below expressly passed on federal constitutional issues which were raised and did decide in favor of the validity of a state statute against the claim that it was repugnant to the Constitution of the United States. Appellants further conclude that even if the court below had intended to rest its decision on a non-federal ground that such ground would not be adequate to support the decision.

Having been denied protection of their federal rights by the state court of Ohio, the Appellants herein can never be said to have had their "day in court" until the Supreme Court of the United States has passed on the merits of their case. It is respectfully submitted that this court can only fulfill its allotted constitutional function by assuming jurisdiction and affording Appellants an opportunity to present the real merits of their case.

Respectfully submitted,

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No. 340. OHIO EX REL. CHURCH ET AL. *v.* BROWN, SECRETARY OF STATE OF OHIO. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Lewis W. Combest* and *Harry W. Day* for appellants. *C. William O'Neill,* Attorney General of Ohio, and *Ralph Klapp* and *Neva H. Wertz,* Assistant Attorneys General, for appellee. Reported below: 165 Ohio St. 31, 135 N. E. 2d 333.